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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1688

LE ROY SYMM, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

On Appeal From The United States District Court
For The Southern District Of Texas

**BRIEF OPPOSING MOTION TO
DISMISS OR AFFIRM**

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Le Roy Symm is the only Appellant in this Court. The Appellees are the United States, the State of Texas, the Attorney General of Texas and the Secretary of State of Texas. This Brief responds to the Motion to Dismiss or Affirm filed on behalf of the State of Texas, the Attorney General of Texas and the Secretary of State of Texas (hereinafter the "State"). The United States has not filed a motion to dismiss or affirm in response to the jurisdictional statement.

As would be expected, the State's Motion argues that the questions involved in this appeal are insubstantial, both in a jurisdictional and precedential sense. The major problem with these arguments is that they focus on form rather than substance.

The State claims the questions are insubstantial in a jurisdictional sense because the case has no statewide implications. But "the lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938); *Goosby v. Osser*, 409 U.S. 512, 518 (1973). Assuming, *arguendo*, no state or nationwide implications, it does not necessarily follow that the federal constitutional questions are insubstantial. Thus, the State's jurisdictional argument is without merit. Instead, *Carrington v. Rash*, 380 U.S. 89 (1965), *Wilson v. Symm*, 341 F. Supp. 8 (S. D. Tex. 1972), and *Ballas v. Symm*, 351 F. Supp. 876 (S. D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974), render the 26th Amendment claim insubstantial. Appellant moved to dissolve the three-judge court on the basis of these three cases but the motion was denied. If this Court agrees that *Carrington*, *Wilson* and *Ballas* so control the case as to render the 26th Amendment claims insubstantial, it certainly has "jurisdiction to determine the authority of the court below and to make such corrective order as may be appropriate . . ." *Bailey v. Patterson*, 369 U.S. 31, 34 (1962). Accordingly, the case could be remanded to a one-judge district court for expeditious disposition.

On the merits, this case is far more than the insignificant local dispute portrayed by the State. Many of the 254 voter registrars in Texas are aware of the issues involved in this case and the lower court's decision. Seventy of them were deposed by the United States. 82.85% of those deposed testified that they would not register an applicant as a voter if they knew that his or her good faith residence was in another county. 84.28% testified that they knew they had a statutory duty to register as voters only those applicants who were good faith residents of the county. 87.17% knew that they had a statutory right to question an applicant concerning his or her good faith residence, and 88.57% knew they had a statutory right to challenge an applicant who was not a good faith resident of the county. 87.14% knew that the term "residence" is defined by the Texas Election Code. It is not an exaggeration to say that in light of the lower court's opinion none of these individuals would undertake to question or challenge a voter applicant, even when confronted with the most extreme example of a nonresident. What possible inquiry or challenge could be made without violating the guidelines established by the District Court? And this uncertainty, or emasculation, is not limited to voter registrars in Texas.

The State says "that students should be entitled to vote where they consider themselves to be residents, even if that happened to be the county where they attended school and not the county where their parents resided." (Motion, 2). This is precisely the residence test implemented by the District Court. The intent and statements of the applicant have always been considered but have never controlled to the exclusion of the facts. Virtually

none of the applicants would be aware of the statutory definition and elements of residence. Their intent and statements as to residence, standing alone, would therefore be meaningless, although in most cases the statements would be made in good faith. How does any political subdivision protect and promote its existence if the electors which control its destiny are not in fact residents? No political subdivision could survive and prosper if the electorate only has a temporary interest in the community. Bonded indebtedness, budgeting of expenses and other long-range planning must rely upon continued community interest and support. This argument is not an effort to exclude from the franchise a sector of the population because of the way they may vote, which was proscribed in *Carrington v. Rash*, it is simply an effort to limit the vote to those with the continuing interest in the community of a bona fide resident. That is the reason for a residence requirement to begin with.

The State argues:

"When an applicant to register as a voter is physically present in Waller County and says that it is both his intention and will that he be a resident of Waller County, questions as to whether he has a job in the county, owns a home in the county, has an automobile registered in the county, lists his telephone in the county, and others of that sort, shed little light on whether, in fact, at that time he is a resident." (Motion, 10)

To the contrary, these inquiries and the others made by Defendant Symm, including the statements of the applicant, are the best available indicia of true residence, which the Texas Election Code defines as "one's home

and fixed place of habitation to which he intends to return after any temporary absence." There are no other objective factors to be considered. If these factors are excluded, nothing remains but the statements of the applicant, which the Appellees and the District Court say should control. But the statements of the applicant have never controlled the issue of residence and they cannot control now if residence is to have any real meaning. Just as a judge or jury must settle and determine disputed facts, someone must determine residence. But disputed facts are not determined by witnesses or parties and residence should not be either. The authority to make the residence determination belongs to the registrar of voters (Appellant Symm) under the Texas Election Code. The District Court and the Appellees have shifted this authority to the voter applicant, who by analogy is only a witness or party to the dispute. Mr. Symm is trying to consider all available evidence and should not be limited to the statements of interested parties.

The State continues:

"In effect, Appellant says that certain indicia can form the basis for a prediction that a person will not remain in Waller County and thus he lacks the necessary intent to remain indefinitely. But the same may be true of persons who have resided in Waller County all of their lives. The probability may be less, but some of those persons will leave and will become residents of other places. If the latter are not denied the right to vote, why should the former?" (Motion, 11).

Answer: Because limiting the vote to bona fide residents of the community is necessary in order for the community

to survive and prosper, and there are no better indicia on which to base a prediction. Obviously, the indicia are not fail-safe but that does not mean that the whole system should be discarded in favor of no meaningful residence requirement at all. The State could just as easily argue that all criminal prosecutions should cease because some innocent defendants may be convicted and punished. Neither argument is workable in our society.

The State claims that this suit "involves only the practices of one official in one county (of 254 counties) without the approval of the State." (Motion, 5) The approval of the State is found in the Texas Election Code and the State Appellees acknowledged this approval in their Original Answers. In fact, the suit involves the right of all voter registrars to determine residence. While superficially no state statute or statewide practice has been declared unconstitutional, the effect is to render numerous state statutes meaningless. This case does not involve age or race discrimination. It involves residence. Mr. Symm is following the only course which implements a meaningful residence requirement.

On April 19, 1978, this Court decided *Elkins v. Moreno*, ___ U.S. ___, 98 S.Ct. 1338 (1978). The opinion recognizes that

"(T)he question of who can become a domiciliary of a State is one in which state governments have the highest interest. Many issues of state law may turn on the definition of domicile: for example, who may vote; who may hold public office; who may obtain a divorce; who must pay the full spectrum of state taxes. In short, the definition of domicile determines who is a full-fledged member

of the polity of a State, subject to the full power of its laws and participating (except, of course, with respect to aliens) fully in its governance". 98 S.Ct. at 1347, n. 16.

In *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230 (1973), the Court enumerated and approved some of the indicia of residence and invalidated a permanent irrebuttable presumption of nonresidence which precluded the opportunity to show such factors. The enumerated indicia included year-round homes, drivers' licenses, car registrations, property ownership, marital status and vacation employment, among others. 412 U.S. at 448 and 454, 93 S.Ct. at 2234 and 2237. The opinion also states:

"We are aware, of course, of the special problems involved in determining the bona fide residence of college students who come from out of state to attend that State's public university. Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a state the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status." 412 U.S. at 452, 93 S.Ct. at 2236.

Both *Elkins* and *Vlandis* were Fourteenth Amendment cases involving residence for tuition purposes and therefore do not directly control the Twenty-Sixth Amendment voting residence issues involved in this case. They do, however, along with *Carrington v. Rash*, reflect this Court's continuing support of State residence require-

ments in all contexts. Likewise, Appellant Symm and all other voter registrars, and the communities they represent, have a continuing interest in limiting the vote to bona fide residents. Mr. Symm should not apply an irrebuttable presumption of nonresidence to dormitory students, but neither should he be limited to the other extreme of considering only the conclusional statement of the applicant that he or she is a resident. And he certainly should not be told by a federal district court that all unemployed dormitory students, who own no property in the county, do not stay in the county during vacation, and do not intend to stay in the county after graduation are residents for voting purposes (which is exactly what the injunction says). He should be permitted to examine all reasonable indicia of residence before making a determination and registering an applicant as a voter.

For the reasons stated, the State's Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

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